



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[EPA-HQ-OW-2009-0596; FRL-9916-62-OW]

RIN 2040-AF50

Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Withdrawal

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing its withdrawal of federal water quality standards applicable to waters of the state of Florida now that Florida has adopted and EPA has approved relevant state standards. On December 6, 2010, EPA published a rule finalizing numeric nutrient standards for Florida's lakes, springs, and flowing waters outside of the South Florida Nutrient Watershed Region. The EPA established these water quality standards to protect Florida's Class I and III freshwaters from nitrogen and phosphorus pollution. On November 30, 2012, June 27, 2013, and September 26, 2013, EPA approved numeric nutrient standards adopted by the state of Florida for certain waters in the state.

Some of the water body types and provisions covered by state-adopted water quality standards were also included in EPA's final inland waters rule (criteria for Florida's lakes and springs, approaches to protect downstream lakes, and a provision for developing Site-Specific Alternative Criteria). The EPA is now withdrawing the overlapping federally-promulgated water

quality standards to allow Florida to implement its state-adopted, EPA-approved water quality standards to address nutrient pollution in Florida's waters. Additionally, this rule serves as final notice that EPA is not finalizing three 2012 federal proposed rules related to nutrient pollution in Florida.

DATES: This final rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-OW-2009-0596. All documents in the docket are listed on the www.regulations.gov web site.

Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information of which disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the EPA Docket Center, EPA West Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004, Attention: Docket ID No. EPA-HQ-OW-2009-0596. The Office of Water (OW) Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket Center telephone number is 202-566-1744. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202-566-1744.

FOR FURTHER INFORMATION CONTACT: For information concerning this rulemaking, contact: Erica Fleisig, U.S. EPA, Office of Water, Mailcode 4305T, 1200 Pennsylvania Avenue, NW, Washington, DC, 20460; telephone number 202-566-1057; email address: fleisig.eric@epa.gov.

SUPPLEMENTARY INFORMATION: This final rule is organized as follows:

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I. General Information

A. Which Water Bodies Are Affected By This Action?

In this final rule, EPA is withdrawing federally promulgated water quality standards (WQS) from a group of inland waters of the United States within Florida. Specifically, as defined below and in EPA's December 6, 2010 final inland waters rule (40 CFR 131.43), EPA is withdrawing the federal criteria for Florida's Class I and III¹ freshwater lakes and springs, as well as downstream protection values (DPVs) to protect downstream lakes and a provision for developing site-specific alternative criteria (SSAC) in all water bodies.

¹ According to Subsection 62-302.400(1), Florida Administrative Code (F.A.C.):
Class I Potable Water Supplies

Class III Fish Consumption; Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife

The EPA's final inland waters rule defined "Predominantly fresh waters" to mean surface waters in which the chloride concentration at the surface is less than 1,500 milligrams per liter (mg/L). The EPA defined "Lake" as a slow-moving or standing body of freshwater that occupies an inland basin that is not a stream, spring, or wetland. Finally, EPA defined "Spring" as a site at which ground water flows through a natural opening in the ground onto the land surface or into a body of surface water.

B. What Entities May Be Affected By This Action?

This action withdraws federal WQS applicable to certain waters in Florida for which the state has adopted criteria that EPA has determined are consistent with the Clean Water Act (CWA) and EPA's implementing regulations. Citizens concerned with water quality, as well as the state of Florida, may be interested in this rulemaking. Also, entities discharging nitrogen or phosphorus to waters of Florida may be interested in this rulemaking because WQS are used in determining National Pollutant Discharge Elimination System (NPDES) permit limits. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

C. How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* The EPA has established an official public docket for this action under Docket Id. No. EPA-HQ-OW-2009-0596. The official public docket consists of the document specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include CBI or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the OW Docket, William Jefferson Clinton

West, Room 3334, 1301 Constitution Ave., NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (202) 566-2426. A reasonable fee will be charged for copies.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "Federal Register" listings at <http://www.epa.gov/fedrgstr/>. An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.regulations.gov> to view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility identified in Section I.C(1).

II. Background

A. Background on EPA's Inland Rule, Amended Determinations, and Approval of State Criteria

On December 6, 2010, pursuant to a January 14, 2009 EPA determination and December 30, 2009 consent decree, EPA published the inland waters rule to establish numeric nutrient criteria for Florida's lakes, springs, and flowing waters outside of the South Florida Nutrient

Watershed Region². These criteria also included three approaches for deriving DPVs, applicable to flowing waters at the point where they enter downstream lakes, which would ensure protection of downstream lakes as required by EPA's implementing regulations (40 CFR 131.10(b)).

On November 30, 2012, EPA amended its January 14, 2009 determination stating that numeric criteria for downstream protection are not necessary to meet CWA requirements in Florida. With the additional clarification provided in Florida's "Implementation of Florida's Numeric Nutrient Standards" rule-referenced document on the scope of waters covered by state-adopted numeric nutrient criteria, EPA amended its January 2009 determination for a second time on June 28, 2013, concluding that numeric nutrient criteria are not necessary for a limited number of waters in the state of Florida (specifically, flowing waters in the South Florida Region, marine lakes, tidally-influenced flowing waters, and conveyances primarily used for water management purposes with marginal or poor stream habitat components).

These actions, coupled with EPA's November 30, 2012, June 27, 2013, and September 26, 2013 approvals of Florida's numeric nutrient criteria, result in Florida having EPA-approved numeric nutrient criteria for all fresh water lakes, springs, estuaries and coastal waters, and the majority of flowing waters in the state.

B. 2014 District Court Ruling and Modification of Consent Decree

On January 7, 2014, the U.S. District Court for the Northern District of Florida granted an EPA motion to modify the consent decree (Case No. 4:08-cv-324-RH, *Florida Wildlife Fed'n v. McCarthy*, 2014 WL 51360 (N.D. Fla. Jan. 7, 2014)). As a result of this ruling, EPA is no

² EPA defined the South Florida Nutrient Watershed Region as the area south of Lake Okeechobee, the Caloosahatchee River watershed (including Estero Bay) to the west of Lake Okeechobee, and the St. Lucie watershed to the east of Lake Okeechobee.

longer obligated to promulgate numeric nutrient criteria for any of Florida's waters, and will, therefore, not be finalizing its November 30, 2012 federal proposed rules addressing Florida's estuaries and coastal waters, inland waters in the South Florida Nutrient Watershed Region, and the remanded portions of the inland waters rule (77 FR 74923 and 77 FR 74985, December 18, 2012). In addition, EPA will no longer be finalizing its December 14, 2012 proposal to temporarily stay portions of the inland waters rule. The EPA can now withdraw already promulgated federal criteria so Florida's nutrient criteria can take effect.

For more specifics on the Agency and court actions leading to this rule, refer to the following:

EPA Determination Regarding Florida and Consent Decree:

http://water.epa.gov/lawsregs/rulesregs/florida_consent.cfm

Florida Adoption of Numeric Nutrient Criteria in 2012 and EPA Approval:

<http://www2.epa.gov/aboutepa/epa-florida>

EPA's 2012 Proposed Rulemaking: http://water.epa.gov/lawsregs/rulesregs/florida_index.cfm

2013 EPA and FDEP Agreement in Principle and Path Forward:

<http://content.govdelivery.com/bulletins/gd/FLDEP-713cfb>

C. Summary of and Response to Public Comments on the Proposed Rule

The EPA received 12 comments on the proposed withdrawal of federal criteria for lakes, springs, and downstream protection values for the state of Florida (79 FR 18494, April 2, 2014). Eight of the commenters supported the proposal to withdraw federal water quality standards in Florida, arguing: a) the primacy for establishing water quality standards lies with the states, b) EPA's approval of Florida's water quality standards eliminates the need for federal standards, and

c) the U.S. District Court's January 7, 2014 order relieves EPA of the obligation to finalize numeric nutrient criteria within the state of Florida.

The EPA agrees that the basis to withdraw (and not finalize) federal numeric nutrient criteria in the state of Florida is justified by the following: (1) EPA's November 30, 2012, June 27, 2013, and September 26, 2013 approvals of Florida-adopted numeric nutrient criteria and other water quality standards, (2) EPA's November 30, 2012 and June 28, 2013 amended Clean Water Act section 303(c)(4)(B) determinations, and (3) the U.S. District Court's January 7, 2014 order modifying the consent decree to relieve EPA of the obligation to finalize numeric nutrient criteria for various waters in Florida. These three items are described in more detail in sections II.A and II.B of this rule.

The EPA received four comments requesting that federal water quality standards for nutrients remain in effect in the state of Florida, stating that aquatic resources in the state have experienced detrimental effects resulting from nitrogen and phosphorus pollution and Florida's water quality standards will be insufficient to address the problem. The EPA disagrees that federal numeric nutrient standards are necessary now that Florida has adopted and EPA has approved state standards to address nitrogen and phosphorus pollution. The Clean Water Act assigns to the states the primary authority for setting water quality standards. The EPA's role is largely one of oversight, in which it reviews and approves or disapproves a state's new or revised water quality standards as they are adopted and submitted to EPA. Florida now has state-adopted, EPA-approved criteria for lakes and springs that are applicable for Clean Water Act purposes. Thus there is no need for overlapping federal criteria for such waters.

One comment requested that EPA not relinquish oversight authority of Florida's water quality standards. Withdrawal of EPA's federal water quality standards does not mean that EPA is relinquishing its Clean Water Act oversight authority in Florida. Under section 303(d) of the Clean Water Act, monitoring data as well as other information must be used by the states every two years to develop a list of waters that will not meet water quality standards for a particular pollutant. The EPA reviews and approves or disapproves state 303(d) lists, and tracks impaired waters nationally. Similarly, Florida controls water pollution by issuing National Pollutant Discharge Elimination System (NPDES) permits to point sources that discharge pollutants into waters of the United States. The EPA retains oversight authority for such permits, pursuant to section 402(d) of the CWA and 40 CFR 123.44(a), including the authority to review and comment on the permits before they are finalized.

One commenter argued that EPA should not withdraw its federal standards because the U.S. District Court's January 7, 2014 ruling on the modification of the 2009 consent decree has been appealed to the U.S. Circuit Court for the 11th Circuit. The EPA recognizes that a decision from the Court of Appeals may affect that District Court decision and may make it necessary for the Agency to reconsider its obligations pursuant to the original January 14, 2009 necessity determination and ensuing consent decree entered by the U.S. District Court on December 30, 2009.

Finally, several of the 12 comment letters that EPA received on this rule included comments and attachments that addressed the content, scope, or protectiveness of Florida's water quality standards. These comments are directed at whether EPA should have reached the decisions that serve, in part, as the basis for EPA withdrawing its federal water quality standards in Florida. The EPA considered substantially similar issues as those raised in the comments in

deciding to approve Florida's new or revised water quality standards and to amend its Clean Water Act section 303(c)(4)(B) determination. Since these comments address EPA's underlying decisions, rather than whether EPA should withdraw its federal standards in light of those decisions, the comments are outside the scope of this action and, therefore, EPA did not address them.

D. Withdrawal of Federal Criteria for Lakes, Springs, and DPVs

Florida now has state-adopted, EPA-approved criteria for lakes and springs that are applicable for CWA purposes. Thus there is no need for overlapping federal criteria for such waters. With respect to federal DPVs, EPA determined on November 30, 2012 that numeric criteria for downstream protection are not necessary in Florida and that same day approved Florida's quantitative downstream protection approach. Finally, since Florida has its own process for developing SSAC, a federal SSAC process is unnecessary. Thus, EPA is withdrawing the federal criteria for lakes and springs and federal DPVs that took effect on January 6, 2013, and the federal SSAC provision that went into effect on February 4, 2011.

III. Statutory and Executive Order Reviews

A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is, therefore, not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This rule does not impose any new information-collection burden because it is administratively withdrawing federal requirements that are no longer needed in Florida. It does not include any information-collection, reporting, or recordkeeping requirements.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201 (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This rule will not impose any requirements on small entities.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for state, local, or tribal governments or the private sector. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule removes federally-promulgated water quality standards addressing nutrient pollution in Florida in order to allow Florida to implement its state-adopted, EPA-approved water quality standards.

E. Executive Order 13132 (Federalism)

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule removes federally-promulgated water quality

standards addressing nutrient pollution in Florida in order to allow Florida to implement its state-adopted, EPA-approved water quality standards. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule imposes no regulatory requirements or costs on any tribal government. It does not have substantial direct effects on tribal governments, the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045 (Protection of Children from Environmental Health and Safety Risks)

This rule is not subject to Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant as defined in Executive Order 12866 and because the environmental health or safety risks addressed by this action do not present a disproportionate risk to children.

H. Executive Order 13211 (Actions that Significantly Affect Energy Supply, Distribution, or Use)

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because: (1) Florida's WQS apply to waters across the state, and thus this action will not disproportionately affect any one group over another, and (2) EPA has previously determined, based on the most current science, that Florida's adopted and EPA-approved criteria are protective of human health and aquatic life.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

List of Subjects in 40 CFR Part 131

Environmental protection, Florida, Nitrogen and phosphorus pollution, Numeric nutrient criteria, Nutrients, Water quality standards.

Dated: September 17, 2014.

Gina McCarthy,
Administrator.

For the reasons set out in the preamble, 40 CFR part 131 is amended as follows:

PART 131--WATER QUALITY STANDARDS

1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

Subpart D—Federally Promulgated Water Quality Standards

§ 131.43 [Removed]

2. Remove § 131.43.

[FR Doc. 2014-22835 Filed 09/24/2014 at 8:45 am; Publication Date: 09/25/2014]